BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE O'NEAL Claimant	)	
VS.	)	
ALL CITIES ENTERPRISES Respondent	)	Docket No. 1,018,484
AND	)	
COMMERCE & INDUSTRY INS. CO. Insurance Carrier	)	

ORDER

Claimant requested review of the June 12, 2006 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on September 26, 2006.

APPEARANCES

Jeff K. Cooper of Topeka, Kansas, appeared for the claimant. Christopher J. McCurdy of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the May 18, 2006 deposition of Mark Hall should be included in the evidentiary record.

ISSUES

The Administrative Law Judge (ALJ) found the claimant sustained a 16 percent permanent partial scheduled disability to the leg due to the accidental injury arising out of and in the course of employment with the respondent.

The claimant requests review of the following: (1) nature and extent of disability, including whether his injury and resulting disability is one contained within the schedules or is instead a general body disability and, if a general body disability, whether he is entitled to a work disability; and, (2) additional weeks of temporary total disability compensation.

Claimant argues he suffered an 11 percent whole person functional impairment because he not only suffered a leg injury but also injured his hip joint. Claimant further argues he is entitled to a work disability based upon an 81 percent task loss and a 34 percent wage loss resulting in a 57.5 percent work disability. Claimant finally argues he is entitled to an additional 3.29 weeks of temporary total disability compensation from January 26, 2005, through March 2, 2005, (5.14 weeks) minus an overpayment of temporary total disability from June 3, 2005, through June 15, 2005, (1.86 weeks).

Respondent argues the ALJ's analysis that claimant suffered a scheduled injury to his leg should be affirmed. In the alternative, respondent argues that if it is determined claimant suffered a whole person impairment then claimant's award should be limited to his functional impairment because he voluntarily terminated his employment with the respondent. Finally, respondent argues it is entitled to a credit due to an overpayment of 1.86 weeks in temporary total disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant was injured in a fall at work on August 2, 2004. The claimant was climbing over a wall at the suggestion of his supervisor when he fell. Claimant testified that his supervisor, fearful that he would be disciplined for having claimant climb the wall, instructed claimant to report that he got sick at work but fell and was injured at home. Claimant followed the suggestion and initially stated he had fallen at home. The false version of where the fall occurred was corroborated by another of claimant's supervisors.

Mark Hall, the respondent's superintendent responsible for the work in the field, thought the story that claimant had gotten sick at work and then had fallen at home was odd. Mr. Hall talked to the two supervisors and then visited claimant at the hospital where he received a written statement from claimant that he had fallen at home. But Mr. Hall felt he was being misled and when he again confronted claimant's supervisor he was then told how the accident had occurred at work. Mr. Hall testified that the supervisors indicated they had fabricated where the accident occurred because they did not think claimant would pass the urinalysis which is required after any accident at work.[1] Both of claimant's supervisors were terminated from respondent's employment because of this incident.

On August 2, 2004, the claimant was admitted at Geary County Community Hospital in Junction City, Kansas. That same day Dr. Allan D. Holiday performed an open reduction

[1] Hall Depo. at 6.

and internal fixation of claimant's left hip fracture. Although the fracture was below the hip joint, during surgery the doctor had to disarticulate the femoral head from the hip joint and insert a guide pin as well as a 100 mm screw in the femoral head. Claimant used a walker for about three months after the surgery.

The claimant was referred for physical therapy to begin December 20, 2004, three times a week for six weeks. Claimant attended the first session but did not return until January 7, 2005, and then did not return until March 2005. Claimant admitted he missed his sessions in December because he was out of town visiting family for two weeks. Claimant testified that his other missed sessions were because he did not have transportation. But he agreed that he never told the case manager that he was without transportation until sometime in February 2005. Thereafter, the respondent arranged for a cab to take claimant to his physical therapy appointments.

On June 3, 2005, Dr. Holiday released claimant to return to work as tolerated. The claimant went to see Mr. Hall that day to explain he had been released to return to work but was using crutches because he had sprained his ankle. Claimant told Mr. Hall that he would need a week to get over the ankle sprain and would then report to work. Mr. Hall testified that he smelled alcohol on claimant and claimant's demeanor indicated to Mr. Hall that he was intoxicated. Mr. Hall told claimant to keep him informed and the meeting concluded. Claimant denied he had been drinking that day.

Mr. Hall next saw claimant on June 30, 2005. Claimant appeared that day and told Mr. Hall that he was ready to go back to work. Mr. Hall was angry that claimant had not reported to work as he had said he would within a week nor communicated with respondent during the 27-day interim time period. Consequently, Mr. Hall terminated claimant's employment with respondent. Claimant testified that Mr. Hall was belligerent and called him a liar, stated that he got two good men fired and then fired him.

Mr. Hall then reported to the office manager that he had fired claimant and was told that the project manager, Don Goff, had sent claimant a letter dated June 27, 2005, which advised claimant to report back to work within five days. The letter provided in pertinent part:

> This letter serves as official notification of your possible termination of employment with All Cities Enterprises, Ft. Riley Division.
>
> As per your Doctors release date you were expected to return to work to full duty on June 6, 2005. On June 3rd, 2005 that date, you did show up and presented your self with crutches and intoxicated. We have not received any extended Doctor's releases keeping you from working, or continuing you Worker's Compensation. We have made several attempts to contact you by phone at which time we have not received a returned phone call nor have you showed up to work.

> As of the date of this letter you will have 5 days to present your self to work. Should you not report within the time given to it will then be clear to us that you are terminating your employment with All Cities Enterprises.[2]

Mr. Hall then went to claimant's house and explained that he was unaware the letter had been sent and that he would honor the letter and put claimant back to work conditioned upon claimant taking a urinalysis and chemical screening. Mr. Hall told claimant he could take him for the testing that day but claimant could not go because he was preparing dinner for his son. The claimant agreed to undergo the testing the following day, July 11, 2005, and Mr. Hall confirmed he would pick claimant up at nine a.m. and take him for testing.

Mr. Hall reported to work the next day before going to pick up claimant and was told claimant had left a telephone message that he would be unable to keep the appointment because he had other meetings scheduled. Claimant never contacted Mr. Hall to reschedule an appointment. On Monday, July 11, 2005, claimant appeared at Mr. Hall's office with his tool belt and ready to work, but Mr. Hall had a safety meeting to attend so he told claimant that he would get with him after the meeting.

While claimant waited to talk to Mr. Hall he had a conversation with another employee who told him that he would be required to take a urinalysis before he could return to work. Claimant decided he would not take the test and left before talking to Mr. Hall. Claimant testified that he had not been told his return to work was conditioned upon taking a urinalysis until he first learned of that condition on July 11, 2005. Claimant testified:

> Q. So what happened after you were told you had to take a UA?
>
> A. Well, I replied that I wasn't going to do it. No one else was required to do it. And the way it seemed to appear to me, that Mark had a problem with me coming back to work for the company, period. And once I started going down that road, every time I turned around he'd be nitpicking on this or that or the other, and that's when he started, you know, allowing me, you know, to be treated any different than any other employee on the job.
>
> Q. So did you leave at that point?
>
> A. Yes.
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> Q. Do you feel like you were treated differently than the new employee that come on that day, July 11?
>
> A. Yes.

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[2] R.H. Trans., Resp. Ex. 1.

> Q. Had you been told at any point in time that the employment requirements had changed, that all employees now had to do a UA, or anything like that?
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> A. No.
>
> Q. Did you have any reason, alcohol, or drugs, not to do a UA?
>
> A. No. Other than, like I said, it was just Mark trying to start a different path with me or whatever, and I just wasn't going to start. I -- you know, once I started that, you know, next thing you know, he's going to be nitpicking my work trying to micromanage anything I did, so I just wasn't gonna start.[3]

As the safety meeting was concluding Mr. Hall saw claimant talking with Marty Jones and as Mr. Hall left the meeting he saw claimant leaving and did not get to talk to claimant. Mr. Hall testified:

> Q. Did you ask Marty Jones what they talked about?
>
> A. Yes, I did.
>
> Q. All right. Mr. O'Neal had basically testified that Marty told him that you planned on him having a - - going to a UA and his testimony was - - I can't find it exactly - - along the lines of "I've never pissed for anybody before and I'm not going to start now," something along those lines?
>
> A. Basically that was the statement made.
>
> Q. Okay. If he had done the UA like you wanted and been cleared for work, did you have work available for him here to do?
>
> A. Yes, we did.[4]

After claimant left respondent's employment he worked with his father mowing lawns, then performed siding jobs and finally obtained construction work.

The medical evidence consisted of the parties medical expert testimony as the treating physician did not testify. Dr. Sergio Delgado examined claimant on August 9, 2005, at the request of claimant's attorney. The doctor diagnosed claimant with low back complaints as a result of his limp and left lower extremity atrophy all related to his fractured

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[3] *Id.* at 27-29.

[4] Hall Depo. at 21.

left hip injury. Based upon the AMA *Guides*[5], the doctor opined claimant suffered a 5 percent whole person impairment based upon DRE lumbosacral category II for his low back complaints. For the left leg atrophy the doctor opined claimant suffered a 6 percent whole person impairment. The two whole person impairments combined for an 11 percent whole person functional impairment. Dr. Delgado imposed restrictions against climbing ladders and limited lifting from the floor not to exceed 20-25 pounds on a repetitive basis and 40 pounds occasionally. The doctor concluded claimant should avoid prolonged standing, walking or running.

Dr. Chris Fevurly examined the claimant on May 10, 2006, at the request of respondent's attorney. The doctor opined claimant suffered a 15 percent impairment to the lower extremity as a result of his left leg calf and thigh atrophy. Dr. Fevurly further opined claimant's limp was due to atherosclerosis unrelated to the accident. Finally, the doctor concluded claimant did not require restrictions as a result of the work-related accident.

The ALJ concluded the claimant suffered a scheduled disability to the left lower extremity. The claimant argues that he suffered disability in the hip joint which results in a whole person impairment.

In the determination of whether the claimant has sustained a scheduled or a non-scheduled disability it is the situs of the resulting disability, not the situs of the trauma, which determines the workers' compensation benefits available.[6] And K.A.R. 51-7-8(c)(3) provides that an injury involving the hip joint shall be computed on the basis of a whole person disability.

Dr. Fevurly opined claimant suffered a 15 percent impairment as a result of the atrophy in his left lower extremity which would convert to a 6 percent whole person impairment. And when asked to compare his range of motion examination findings with the AMA *Guides* the doctor agreed that painful adduction at 10 degrees would comport with a mild impairment which the doctor noted would be a 5 percent impairment. And the doctor agreed the claimant has mild impairment attributable to the hip joint itself.

The Board finds claimant has met his burden of proof to establish he suffered impairment in his hip joint and is entitled to compensation based upon a whole person impairment. Both Drs. Delgado and Fevurly concluded the claimant's left leg atrophy would result in a 6 percent whole person functional impairment. Dr. Fevurly agreed that claimant's loss of range of motion in the hip would result in a 5 percent whole person

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] *Bryant v. Excel Corporation*, 239 Kan. 688, 722 P.2d 579 (1986); *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

functional impairment. The Board finds claimant has suffered an 11 percent whole person functional impairment.

Claimant argues he is entitled to a work disability because it was reasonable for him to refuse to take a urinalysis because no other employee had been required to submit to such a test and Mr. Hall admittedly did not care for him such that he would be returning to a hostile work environment.

The Kansas appellate courts, beginning with *Foulk*[7], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of his pre-injury wage at a job within his medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decisions is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[8] Before claimant can claim entitlement to work disability benefits, he must first establish that he made a good faith effort to obtain or retain appropriate employment.[9]

Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[10] where the accommodated job violates the worker's medical restrictions,[11] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[12] The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.

The claimant argues he was being singled out to submit to a urinalysis before he would be allowed to return to work and that he would have returned to a hostile work environment because of Mr. Hall. While it is clear that Mr. Hall was not happy about having

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[7] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[8] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[11] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[12] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

claimant return to work for respondent, nonetheless, he did not directly supervise claimant and had claimant returned to work it is mere conjecture whether he would have "nitpicked claimant's work."

The claimant was requested to submit to a urinalysis in order to make himself eligible for a return to his employment with respondent. Such request was occasioned by Mr. Hall's conclusion claimant was intoxicated when he first returned to work on crutches on June 3, 2005. Given that belief it cannot be said it was unreasonable to request claimant be tested nor that the testing was just to single out the claimant.

The ALJ determined the claimant had no persuasive reason not to comply with the request for a urinalysis nor any reason not to attempt to offered work. The Board agrees and finds claimant's actions demonstrated a lack of good faith in not attempting to return to his job. As Mr. Hall testified claimant would have received his pre-injury salary that wage will be imputed to claimant. Because claimant would have received at least 90 percent of his pre-injury wage his compensation will be limited to his 11 percent whole person functional impairment.

Lastly, the claimant requests additional weeks of temporary total disability compensation. The ALJ did not grant additional weeks of temporary total disability compensation. The ALJ ruled:

> The Court finds the Claimant exhibited a certain degree of bad faith in not timely advising the Respondent of his transportation difficulties, thereby being responsible for his physical therapy taking longer than was reasonable. It also appears that once the Claimant did so advise, it took the Respondent a certain amount of time to arrange for transportation. The Court finds that the Claimant should be allowed TTD benefits for the delay occasioned by the delay in transportation, but that any such benefits are canceled out by the credit given to the Respondent for the TTD benefits paid beyond when the Claimant was ultimately released from treatment. Therefore no additional TTD benefits are ordered paid, and neither will the respondent be given any credit against the Award in this case.[13]

The Board agrees and affirms.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 12, 2006, is modified to reflect claimant suffered an 11 percent whole person functional impairment and affirmed in all other respects except attorney fees.

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[13] ALJ Award (Jun. 12, 2006) at 5.

The record does not contain a filed fee agreement between claimant and his attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.

The claimant is entitled to 39.86 weeks of temporary total disability compensation at the rate of $449 per week or $17,897.14 followed by 42.92 weeks of permanent partial disability compensation at the rate of $449 per week or $19,271.08 for an 11 percent functional disability, making a total award of $37,168.22, which is ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this 31st day of October 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge